No. 84-843 (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RUDY DURAND AND KOALA PRODUCTIONS, LIMITED,
Petitioners,

v.

SIMON PRODUCTIONS NO. 2, INC., SIMON FILM PRODUCTIONS, INC., MELVIN SIMON PRODUCTIONS, INC., MELVIN SIMON, NATIONAL BROADCASTING COMPANY, INC., WARNER BROS. INC., VIACOM INTERNATIONAL, INC., MYRON L. SLOBODIEN, LEROY BOBBITT, LOEB & LOEB, JOHN FRANKENHEIMER, RICHARD B. KAPLAN AND KAPLAN, LIVINGSTON, GOODWIN, BERKOWITZ & SELVIN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court review the determination of the Central District of California, as affirmed by the Ninth Circuit, that Petitioners failed to allege a violation of the Lanham Act?

2. Is there a Constitutional right to be represented *pro hac vice* by an out-of-state attorney who does not meet the local standards for such representation?

   (a) Should Petitioners be permitted to raise this issue in this Court when they have neglected to properly raise it either before the Ninth Circuit or the District Court?

COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

The crux of Petitioners'[1] Lanham Act claim is that since 1979 Respondents[2] have conspired in the exploitation of one version of the motion picture entitled Rudy Durand's "Tilt", which version Durand edited according to some of Respondents' requests (hereinafter the "Release version"), rather than another version which he edited according to his own taste. At the time of its original distribution, Durand publicly claimed full credit for the Release version and actively

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[1]Rudy Durand and Koala Productions, Ltd., (hereinafter collectively referred to as "Petitioners").

[2]Simon Productions No. 2, Inc., Simon Film Productions, Inc., Melvin Simon Productions, Inc., Melvin Simon, National Broadcasting Company, Inc., Warner Bros. Inc., Viacom International, Inc., Myron L. Slobodien, Leroy Bobbitt, Loeb & Loeb, John Frankenheimer, Richard B. Kaplan and Kaplan, Livingston, Goodwin, Berkowitz & Selvin (hereinafter collectively referred to as "Respondents").

The listing of parent corporations and subsidiaries for compliance with Rule 28.1 appears on the inside back cover of this brief.

assisted in its marketing. Petitioners now claim that the use of Durand's name in conjunction with the title constitutes a false representation even though he wrote, directed, produced and edited the motion picture.

The Central District of California dismissed Petitioners' first amended complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and denied Petitioners leave to file a proposed second amended complaint on the ground of futility. The Ninth Circuit affirmed. Petitioners do not claim that either of these courts misinterpreted the law or misunderstood the facts of this case. Indeed, there is no conflict between the law as applied by either the District Court or the Ninth Circuit and the law as applied in any other reported decision. Nor do Petitioners claim that this case presents any question of importance to anyone other than themselves. Petitioners merely seek another avenue of appeal from the decision of the Central District.[3]

Petitioners also ask this Court to create a new Constitutional right—the right of a lawyer admitted in one state to appear before a federal district court situated in another state. Petitioners claim that the Central District of California violated the Due Process Clause when it denied James Ortego permission to appear *pro hac vice* on behalf of Koala Productions, Limited—even though Ortego clearly did not satisfy the Local Rule governing such an appearance in that district. This Court has already held that there is no Constitutional right to appear *pro hac vice* and that hence the Due Process Clause does not apply to this privilege. *Leis v. Flynt*, 439 U.S. 438 (1979), *reh'g denied*, 441 U.S. 956 (1979). Moreover, Petitioners did not raise this constitutionality issue in either the Central District or in any of their appearances before the Ninth Circuit and should not be permitted to raise it here.

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[3]For this reason, unfortunately, Respondents must address the merits of the case in order to adequately respond to the petition.

B. Nature of the Case and Course of Proceedings.

Petitioners filed their original complaint on March 18, 1981 and their first amended complaint on May 4, 1981. Respondents moved to dismiss the first amended complaint on May 27, 1981. During the course of Petitioners' efforts in the Ninth Circuit to have Mr. Ortego admitted *pro hac vice* and various judges of the Central District disqualified, a stay of proceedings was in effect. Before the District Court ruled on Respondents' motions to dismiss, Petitioners moved for leave to file a second amended complaint.

On June 30, 1983, the District Court dismissed the first amended complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and denied Petitioners' motion for leave to file a second amended complaint on the ground that to do so would be futile as it also failed to allege a Lanham Act violation. Even though it gave Durand the benefit of directing its analysis principally to the "improved" proposed second amended complaint, the District Court found "[t]hat neither raise any federal questions."

The Ninth Circuit affirmed the District Court's decision. Though the Ninth Circuit faulted the District Court for dismissing the first amended complaint under Rule 12(b)(1) after considering the merits, the appellate court found "ample evidence" to dismiss Petitioners' action under Rule 12(b)(6) or Rule 56 and therefore affirmed the decision.

C. Statement of Facts.

1. The Purported Lanham Act Violation.

In May 1977, Rudy Durand sold to Simon Productions No. 2, Inc.[4] his original motion picture screenplay entitled

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[4]As further definition is unnecessary for a determination of the instant petition, and for simplicity, hereinafter Simon Productions No. 2, Inc., Simon Film Productions, Inc., Melvin Simon Productions, Inc. and Melvin Simon will collectively be referred to as "Simon."

"Tilt" and Simon agreed to finance the production and distribution of a feature motion picture based on that original screenplay. The parties further agreed that Durand would produce, direct, select the cast, select the production crew, select the composer(s) of the musical score and supervise the editing of "Tilt." In recognition of Durand's contribution to the motion picture, the parties agreed that in exploiting the motion picture Durand's name would appear immediately before the title so that it would read as follows: "Rudy Durand's Tilt."

The first preview of "Tilt", held in August 1978, was not a success. In September 1978, Simon requested that Durand make various editing changes in the motion picture, which changes Durand made. In October 1978, Simon previewed this second version (the Release version). Based on the results of this preview Warner Bros. Inc. agreed to try to distribute the Release version. At the time of its distribution Durand claimed full credit for the Release version and was the moving force behind its marketing.[5] The Release version opened in April 1979 in ten cities around the country, but did not perform well. After learning that "Tilt" had failed, Durand asked Simon for permission to re-edit "Tilt" a third time. Simon agreed in a letter to Durand that Simon would screen and analyze this third version and that Simon would then make the final determination regarding any future exploitation or distribution of "Tilt."[6]

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[5]Respondents' "Opposition to 'Motion For Leave To Consider Affidavit Of Rudy Durand Correcting Misstatements Made In Oral Argument On Appeal'" has been lodged with the Clerk of the Court. Attached to it are various articles from the *Houston Post*, the *St. Louis Post Dispatch*, the *Los Angeles Times*, the *New Orleans Time Picayune* and other newspapers, which articles reflect interviews in which Durand claims full credit for the Release version.

[6]A copy of the letter was attached to and incorporated in both the first amended and the proposed second amended complaints and is included in the Excerpts of the Clerk's Record filed with the Ninth Circuit ("Record") at 206 and 517.

Durand's third recut of "Tilt" was test-screened in New York City in fall 1979, but was not well received. In what subsequent exploitation of "Tilt" there has been, Simon has used the Release version rather than this third version of "Tilt." The gravamen of the petition is that exploitation of the Release version after the creation of the third version, which Durand prefers, is a violation of the Lanham Act.[7] At no time has Durand requested that his name be taken off the screen credits of the Release version of "Tilt" or asked that said credits be changed in any manner whatsoever.

2. Disposition of the Lanham Claim at the District Court and in the Ninth Circuit.

The District Court dismissed the first amended complaint and did not allow Petitioners to file the proposed second amended complaint. The court found that "Rudy Durand's Tilt" was not a false description, representation or designation as to the Release version or its source.

> "Petitioners would be able to state a cause of action under the Lanham Act if their allegation was that defendants themselves had recut 'Tilt' and then released it as 'Rudy Durand's Tilt.' However, the [proposed second amended] complaint itself clearly states that the . . . [Release] version was cut by Durand himself. . . . even if it were true that Durand was fraudulently induced to cut 'Tilt' to Warner's specifica-

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[7] "Petitioners do not contend that the making of the Warner Bros. version or its immediate exploitation constituted a violation of the Lanham Act. The violations occurred only after Durand had been given by Simon, at Simon's expense, his contractually authorized final cut and Respondents, with full knowledge that the final cut was available and was the only contractually authorized version, nonetheless began to substitute the Warner Bros. version of "Tilt" for the fully edited final cut prepared by Durand as his complete statement of his artistic creation." Petition at 23.

tions, this would not give rise to a Lanham Act violation, since 'Tilt' was not misdesignated as 'Rudy Durand's Tilt.' The movie was released as cut by Durand. . . . Plaintiffs cannot state a federal claim under the facts they have presented to this court."

The Ninth Circuit affirmed.

"The district court dismissed this action for lack of subject matter jurisdiction. The court, however, considered the merits of Durand's Lanham Act claim and should have evaluated the claim under Rule 12(b)(6)—failure to state a claim, or Rule 56—motion for summary judgment. This is not reversible error because this court can affirm on any basis presented in the record. [citation omitted] There is ample evidence to dismiss Durand's action under Rule 12(b)(6) or Rule 56. . . . To state a claim under [the Lanham Act] . . . , Durand must show that Simon either falsely designated the origin of Tilt or falsely described Tilt to the public. Durand has not made that showing. . . . Durand edited, and his talent was the origin of both versions of Tilt. Furthermore, Durand advertised, promoted, and helped to distribute the Warner version. Durand represented it as his own to the public, and he did not object until the film failed and he discovered that he still retained final cut authority. There is no violation of the Lanham Act."

3. The Pro Hac Vice Application.

In spring 1981, Jim Ortego, an attorney licensed to practice in Louisiana but not in California, made sworn application to the Central District for permission to appear in this action. The Central District requires that in order to make such an appearance one must neither reside nor work in the

State of California.[8] Hence, in making his application Ortego was required to and did swear: "I am not a resident of, nor am I regularly employed, engaged in business, professional or other activities in the State of California." The court, in apparent reliance upon Ortego's sworn application, gave its permission for Ortego to appear *pro hac vice*. However, Ortego also filed a "Supplementary Application" in which he admitted that at the time of his application he was a resident of California, was regularly employed in California, and was engaged in business, professional and other activities in California, and therefore was not eligible to appear *pro hac vice*.

Consequently, when, on April 22, 1981, the court denied Mr. Ortego's application for admission *pro hac vice*, apparently in the interim having reviewed the Supplementary Application, it properly applied Local Rule 1.

REASONS FOR DENYING THE PETITION

A. The District Court and the Ninth Circuit Were Correct That the Facts Presented by Petitioners Do Not Amount to a Violation of the Lanham Act.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), prohibits the use of false designations of origin and false descriptions in the advertising and sale of goods and serv-

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[8]Rule 1 of the Local Rules of the Central District of California, as then in effect, made an attorney ineligible for admission *pro hac vice* if any of the following was true: (1) he was a resident of California; (2) he was regularly employed in California; or (3) he was regularly engaged in business, professional or other activities in California. *Pro hac vice* admission to the Central District is now governed by Rule 2.2.3 of the current Local Rules.

ices.[9] To state a claim under § 1125(a), Petitioners must show that Respondents either falsely designated the origin of "Tilt" or falsely described "Tilt" to the public.[10] The Release version is, however, Rudy Durand's "Tilt." By contrast, in *Gilliam v. American Broadcasting Companies*, 538 F.2d 14 (2d Cir. 1976) and *Jaeger v. American International Pictures, Inc.*, 330 F.Supp. 274 (S.D.N.Y. 1971), the courts found Lanham violations where defendants materially altered the artist's work without his permission and then falsely presented the work to the public as the artist's own. *See, e.g., Follett v. New American Library, Inc.*, 497

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[9]15 U.S.C. § 1125(a) provides:

> "Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

[10]Though it is not necessary that the representation be literally false, the acts of defendant must create a false impression of the product or its source. *Gilliam v. American Broadcasting Companies*, 538 F.2d 14, 24 (2d Cir. 1976). *Accord McNeilab, Inc. v. American Home Products Corp.*, 501 F.Supp. 517, 532 (S.D.N.Y. 1980) *modified*, 501 F.Supp. 540 (1980); *Universal City Studios, Inc. v. Sony Corp. of America*, 429 F.Supp. 407, 410 (C.D. Cal. 1977); *Rare Earth, Inc. v. Hoorelbeke*, 401 F.Supp. 26, 38 n.22 (S.D.N.Y. 1975); *Mortellito v. Nina of California, Inc.*, 335 F.Supp. 1288, 1294 (S.D.N.Y. 1972); *Geisel v. Poynter Products, Inc.*, 283 F.Supp. 261, 267 (S.D.N.Y. 1968).

F.Supp. 304 (S.D.N.Y. 1980). The decisions of the District Court and of the Ninth Circuit are consistent with these cases. Here, Durand consented to the editing demands of various of the Respondents, took full credit for the Release version, and then actively participated in its marketing. Given his extraordinary level of contribution to the Release version and its distribution, Petitioners have no basis to claim that Durand's credit violates the Lanham Act. *See Autry v. Republic Productions, Inc.*, 213 F.2d 667, 669-70 (9th Cir. 1954), *cert. denied*, 348 U.S. 858 (1954).[11] There is no need for this Court to review the Ninth Circuit's decision.

Nor can Petitioners argue that this Court should grant certiorari because the Lanham issue raised will have far-reaching precedential impact or because it is an important issue. Because the facts of this case are convoluted and not likely to reoccur, only Petitioners would be benefited by this Court's review of the Ninth Circuit decision.

B. There Is No Merit to Petitioners' Contention That Durand's Due Process Rights Were Violated.

Petitioners do not claim that Local Rule 1 was not applicable to Mr. Ortego, but contend only that Local Rule 1 denies *pro se* Petitioner Rudy Durand his due process rights. This Court has flatly rejected the contention that due process rights are involved in *pro hac vice* applications. *Leis v. Flynt*, 439 U.S. 438, 441, 443-44 (1979), *reh'g denied*, 441 U.S. 956 (1979); *see also Norfolk & Western R. Co. v. Beatty*, 400 F.Supp. 234 (S.D. Ill. 1975), *aff'd*, 423 U.S. 1009 (1975);

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[11] Indeed, given Durand's level of contribution to the Release version and his agreement with Simon, had Simon omitted his credit from "Tilt", Respondents might have been accused of violating the Lanham Act on the theory of implied reverse passing-off. *Smith v. Montoro*, 648 F.2d 602, 606-607 (9th Cir. 1981).

Silverman v. Browning, 414 F.Supp. 80 (D.Conn. 1976), *aff'd*, 429 U.S. 876 (1976).

Immediately after Mr. Ortego was denied admission, Petitioners filed, in rapid succession, an ex parte application to have Mr. Ortego reinstated and an application to have the trial judge removed or disqualified. In neither of these motions did the Petitioners challenge the constitutionality of Local Rule 1.[12] After Petitioners' applications were denied, Petitioners filed a petition for writ of mandamus to the Ninth Circuit asking that it disqualify the trial judge and order Mr. Ortego admitted. Again, their petition did not challenge the constitutionality of Local Rule 1. While the Ninth Circuit, on its own motion, requested the Los Angeles County Bar Association to file an amicus brief on the constitutionality of Local Rule 1, the court ultimately declined to address that issue because Petitioners failed to raise it below. (Appendix B to Petition.)

Thereafter, Petitioners filed an ex parte application for transfer of the case and a supplementary application to have Mr. Ortego reinstated as an attorney. Petitioners alluded to the constitutionality issue, but failed to brief or argue it.[13] In subsequent supplemental papers Petitioners stated that they were "prepared to challenge the constitutionality of Local Rule 1," but requested that the court "in the interest of expediting justice . . . order the immediate reinstatement of Jim Ortego as Attorney of Record for corporate

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[12]Indeed, Petitioners admitted in their motion papers that an out-of-state lawyer does not have a due process right to appear *pro hac vice*, citing *Leis v. Flynt*, *supra*.

[13]Petitioners were "[p]repared, if this Court so determines, to argue that Local Rule 1 is unconstitutional both on its face and as applied to the facts of this case." Ex Parte Application For Transfer, dated September 4, 1981, and filed with the Central District of California.

plaintiffs in the exercise of the Court's supervisory authority over the admission of attorneys and pursuant to F.R.C.P. 83." Petitioners went on to state that to require them "to argue the constitutionality of Local Rule 1 at a full Hearing will delay this Court [in] reaching the merits of the Motion for Preliminary Injunction and cause plaintiffs irreparable harm . . ."[14] Thus, rather than presenting their constitutional claims, Petitioners in essence requested that the District Court not consider the constitutionality of Local Rule 1.

The District Court denied Petitioners' applications without any reference to the constitutionality of the Rule.[15] Petitioners sought immediate review by the Ninth Circuit, filing an emergency petition for writs of mandamus and prohibition on September 29, 1981. This petition nowhere suggests that Local Rule 1 is unconstitutional.[16] On September 30, 1981, the Ninth Circuit denied the petition without mentioning Local Rule 1 or its constitutionality.[17]

Petitioners did not raise the issue of the constitutionality of Local Rule 1 in their appeal to the Ninth Circuit from the judgment of dismissal. Petitioners, therefore, ask that this Court become the first court to consider this issue. Petitioners do not explain why they failed to properly raise the

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[14]Petitioner's "Ex Parte Application for Reconsideration" dated September 14, 1981 and filed in the Central District of California.

[15]Minute Order of September 11, 1981, Docket No. 66, Central District of California; Minute Order of September 28, 1981, Docket No. 78, Central District of California; Order of October 6, 1981, Docket No. 76, Central District of California.

[16]Petitioners' "Emergency Supplemental Petition," dated September 29, 1981, is on file with the Ninth Circuit.

[17]Order of September 30, 1981, Docket No. 73, Central District of California.

issue in the trial court or in any of their appeals to the Ninth Circuit. Nor do they justify their argument before this Court that there is a due process right to admission *pro hac vice* when they previously admitted in the trial court that there is no such right. Under these circumstances, there is no reason to depart from the general rule that a federal appellate court does not give consideration to issues not raised below. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941). Petitioners should not be allowed to appeal on one ground and upon finding that ground unavailing, urge a new ground as a basis of a certiorari petition before this Court.

C. This Case Is Not a Suitable Vehicle for Review of Any Issue By This Court.

This is a particularly inappropriate case in which to grant certiorari because, as is clear from the petition, this is not a case in which the Court may rely on Petitioners to present a clear, concise and accurate picture of the evidence and issues below. The stream-of-consciousness petition frequently makes factual assertions unsupported by the record, inferences unsupported by logic, and legal arguments unsupported by law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Ninth Circuit should be denied.

Respectfully submitted,

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The parent company is: MELVIN SIMON PRODUCTIONS, INC.

The subsidiaries are:

SIMON TELEVISION, INC., SIMON FILM PRODUCTIONS, INC., SIMON DISTRIBUTORS, INC., SIDAN PRODUCTIONS, INC., DITCH ROAD MUSIC, INC., MEL REN MUSIC, INC.

2. Re: National Broadcasting Company, Inc.:

The parent company is: RCA INC.

National Broadcasting Company, Inc. is a wholly owned subsidiary.

3. Re: Warner Bros. Inc.:

The parent company is: WARNER COMMUNICATIONS INC.

Warner Bros. Inc. is a wholly owned subsidiary of Warner Communications Inc.

The subsidiaries of Warner Bros. Inc. are:

AFRAM FILMS INC., AMERICAN MOTION PICTURE EXPORT, ATHWARN MUSIC CO., INC., CHATHAM MUSIC CORPORATION, COLUMBIA & WARNER FILMES DE PORTUGAL, LTDA., LOMBARDO MUSIC, INC., MANSFIELD MUSIC CO., INC., MOTION PICTURE EXPORT ASSOCIATION OF AMERICA, INC., NEW WORLD MUSIC CORPORATION, NINE STAR MUSIC CORP., RODART MUSIC CORPORATION, SHUBERT MUSIC PUBLISHING CORPORATION, SUPREME MUSIC CORPORATION, VERNON MUSIC CORPORATION, WARNER BROS. (D) (APS), WARNER BROS. MUSIC INTERNATIONAL INC., WEILL-BRECHT HARMS COMPANY, INC., WESTERN COSTUME CO.

4. Re: Viacom International, Inc.:

The parent company is: VIACOM INTERNATIONAL, INC.

The subsidiaries are:

SHOWTIME/THE MOVIE CHANNEL INC., LIFETIME PRODUCTIONS INC., SATELLITE HOLDINGS INC., SHOWTIME/THE MOVIE CHANNEL (U.K.), ST/TMC PRODUCTIONS INC., CABLE HEALTH NETWORK INC.

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